

January 12, 2022

**Submitted via Email and FOIA Online**

National Freedom of Information Office  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2310A)  
Washington, D.C. 20460  
(202) 566-1677  
Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: FOIA Request for Draft Risk Assessments on PMN Substances  
Shared with PMN Submitters, and Related Documents**

Dear Freedom of Information Officer:

Earthjustice submits this request (the “Request”) for records on behalf of Earthjustice, Safer Chemicals, Healthy Families (“SCHF”), Environmental Defense Fund (“EDF”), and Natural Resources Defense Council (“NRDC”) (together, the “Requesters”) in accordance with the provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2016), and the implementing regulations of the U.S. Environmental Protection Agency (“EPA” or the “Agency”), 40 C.F.R. Part 2. The purpose of the Request is to obtain records relating to drafts of documents a) prepared by EPA in order to assess the safety of new chemical substances for which premanufacture notices were submitted to EPA, pursuant to 15 U.S.C. § 2604(a); and b) shared with the PMN submitter or its lawyers, representatives, consultants, agents or delegates.

Your prompt response pursuant to the requirements of FOIA is appreciated.

**DEFINITIONS**

The Requesters seek the unredacted records listed below. The use of the word “unredacted” means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you cannot disclose all of the information contained in a particular record, please provide us with a copy of the record with redactions of only the information that you have determined to be properly withheld and explain the basis for your determination that such information must be withheld.

The use of the word “records” herein means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, emails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, calendar entries, meeting agendas, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. The term “records” as used above also includes any personal email messages, telephone voice mails or text

messages, and internet ‘chat’ or social media messages, to the full extent that any such messages fall within the definition of “agency records” subject to FOIA, and including any attachments. Per EPA records management policy, electronic messages such as text messages are agency records, which must be preserved and made accessible under FOIA. *See* U.S. Env’tl. Prot. Agency Info. Pol’y, Records Management Policy (2018) at 4, <https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf>. Therefore, a production of responsive records must include records using services including, but not limited to: Google Chat, Google Hangout, Skype, IBM Sametime, Novell Groupwise Messenger, Facebook Messenger, iMessage, Microsoft Teams, and all other texting services, Short Message Service (SMS) and Multimedia Messaging Service on devices including but not limited to, Blackberry, Windows, Apple or Android devices; and Google Voice, Twitter Direct Message, Slack, WhatsApp, Pigeon, Yammer, Jive, and all other internal or external collaboration networks.

## **RECORDS REQUESTED**

In accordance with FOIA, please provide us with the following records. The time period covered by these requests is June 22, 2016 onward.

- 1) Documents prepared by EPA (or its contractors or agents), in connection with PMNs submitted to EPA pursuant to 15 U.S.C. § 2604(a) – including but not limited to draft or final Structure and Activity Team Reports, Chemistry Reports, Engineering Reports, Exposure Reports, Hazard Reports, Focus Reports, Risk Assessments, Briefing Papers, or Regulatory Determinations/Decision Documents – that were shared with the PMN submitter (or its lawyers, representatives, consultants, agents or delegates), in whole or in part, before a final determination was made on the PMN.
- 2) Records reflecting communications between EPA, or its contractors or agents, and the PMN submitter (or its lawyers, representatives, consultants, agents or delegates) related to the draft documents identified in item (1), above, including but not limited to summaries or notes of conversations and meetings, including telephone logs

## **RECORD DELIVERY**

To the extent practicable, the Requesters seek electronic copies of the above documents in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (agency shall provide records in any form or format if the record is readily reproducible in that form or format). If any information requested herein was, but is no longer, in EPA’s possession or subject to its control, please state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) is otherwise disposed of, and in each instance, please explain the circumstances surrounding and authorization for such disposition of it, and state the date or approximate date of it.

Agencies are advised to “make discretionary disclosures of information” and refrain from withholding records “merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.” Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>. If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding;
- (5) If you do not use your discretion to release such complete and unredacted records:
  - (a) examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information deemed to be exempt; and, (b) provide us with a copy of each record with redactions of only the information that you have determined to be properly withheld.

## **FEE WAIVER REQUEST**

### **I. THIS FEE REQUEST SATISFIES THE FIRST FEE WAIVER REQUIREMENT AS THE REQUEST IS IN THE PUBLIC INTEREST**

Pursuant to 5 U.S.C. § 552, we request a waiver of fees that EPA would otherwise charge for searching and producing the records described above, because this Request satisfies both fee waiver requirements. First, FOIA dictates that requested records be provided without charge because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). To determine whether the FOIA request meets this first fee waiver requirement, EPA analyzes four factors: (i) the subject of the request; (ii) the informative value of the information to be disclosed; (iii) the contribution to an understanding of the subject to the public; and (iv) the significance of the contribution to the public understanding. 40 C.F.R. § 2.107(l)(2)(i)–(iv). As demonstrated below, all of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request.

**A. Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government**

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government” 40 C.F.R. § 2.107(l)(2)(i). The records concern “identifiable operations” because they relate to EPA’s evaluation of the safety of new chemical substances for which the submitter seeks approval to commercialize, potentially exposing members of the public or the environment to risk. The Department of Justice Freedom of Information Act Guide acknowledges that “in most cases records possessed by the federal agency will meet this threshold” of identifiable operations or activities of the government. *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers* at 27 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>. There is no question that this is such a case.

**B. Factor 2: Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities**

The next factor considered by EPA is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already...in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 15 C.F.R. § 4.11(l)(2)(ii), of government operations or activities. Recent reporting has indicated that EPA has shared draft assessments of new chemical substances with PMN submitters or their designees, but this information is not available to public health or environmental groups. Disclosure of the requested information will enable the public to both better understand EPA’s process for assessing the safety of proposed new chemical substances and may identify new chemical substances for which there may be conflicting opinion regarding safety.

**C. Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in the Draft Risk Evaluations**

EPA next considers whether disclosure will contribute to a broad “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request, as opposed to the “individual understanding” of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public

interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” the evaluation and regulation of new chemical substances. The public has an interest in the integrity of EPA’s New Chemicals Program, under which EPA reviews and approves chemicals that countless people are then exposed to at work, in their homes, and in their communities. Recent news reports indicated that EPA staff has shared draft new chemical reports and analyses with chemical companies, but have not made those same reports available for public review and comment.<sup>1</sup> To the extent that EPA has provided relevant information to the chemical industry but not the public, the public has the right to understand that scope of those one-sided disclosures and an interest in the requested documents.

The Requesters have the “ability and intention to effectively convey [this] information to the public.” 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice, SCHF, EDF, and NRDC are nonprofit environmental organizations with lawyers, scientists, and public policy professionals on their respective staffs. They have made the promotion of safe and healthy communities free from the health burdens of toxic chemicals a top priority, and they were all actively engaged in the 2016 amendments to TSCA. They have expertise related to both the evaluation and regulation of chemicals under TSCA, and they are well-prepared to evaluate the requested records once received.

The Requesters also have mechanisms in place to share information obtained from the requested records with the general public and other interested organizations. They have submitted and publicized comments on the new chemicals program;<sup>10</sup> filed or been represented on litigation which challenged EPA’s new chemical review procedures;<sup>2</sup> and published numerous articles, blogs, social media postings, and press releases concerning the regulation and evaluation of new chemical substances.<sup>3</sup> The Requesters are well-positioned to share the requested information with interested audiences. Earthjustice’s email list includes 1.8 million people, its website receives approximately 530,000 page views per month, and its quarterly print magazine has a circulation of approximately 100,000. EDF’s website receives approximately 626,000 page views per month and its quarterly print magazine has a circulation of approximately 325,000. SCHF maintains a 37,000 person email list, has 70,000 Facebook followers, 20,000 Twitter followers, and its website receives 34,000 page views per month. NRDC’s website is updated daily, and draws approximately 1.3 million page views and 510,000 unique visitors per month. Finally, all of the Requesters employ or retain communications professionals that can disseminate newsworthy information obtained from this request to the media.

#### **D. Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant**

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<sup>1</sup> See <https://theintercept.com/2021/07/02/epa-chemical-safety-corruption-whistleblowers/>

<sup>2</sup> INSERT Earthjustice case; prior NRDC/SCHF cases

<sup>3</sup> INSERT Richard blogs, Daniel blogs, OTHER??

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information...will enhance the public’s understanding,” the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all the information contained therein, through EPA’s website or internet searches.

Thus, the public’s understanding of EPA’s approach to assessing the safety of new chemical substances “will be significantly enhanced by the disclosure.” *See* 15 C.F.R. § 4.11(l)(2)(iv).

## **II. THIS REQUEST SATISFIES THE SECOND FEE WAIVER REQUIREMENT AS REQUESTERS HAVE NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS**

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because the Requesters do not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(3). Requesters are 501(c)(3) nonprofit organizations and they do not have any “commercial interest that would be furthered by the requested disclosure” of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of their respective missions to inform and protect the public on matters of vital importance to the environment and public health. Further, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us and inform us of the basis for your decision.

## **INSTRUCTIONS FOR RECORD DELIVERY**

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must...indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please also produce the records on a rolling basis; at no point

should EPA's search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below:

Eve Gartner  
Earthjustice  
48 Wall Street, 19th Floor  
New York, NY 10005  
[egartner@earthjustice.org](mailto:egartner@earthjustice.org)

If you find that this Request is unclear or if the responsive records are voluminous, please contact me at [egartner@earthjustice.org](mailto:egartner@earthjustice.org) or 212-845-7381 to discuss the proper scope of this Request. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Eve C. Gartner". The signature is fluid and cursive, with the first name "Eve" and last name "Gartner" clearly legible, and "C." as a small middle initial.

Eve C. Gartner